

Cai (Migration) [2018] AATA 4865 (18 October 2018)

CORRIGENDUM

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Minying Cai
CASE NUMBER:	1714473
DIBP REFERENCE(S):	BCC2016/1740456
MEMBER:	Hugh Sanderson
DATE OF DECISION:	18 October 2018
DATE CORRIGENDUM SIGNED:	30 January 2019
PLACE OF DECISION:	Sydney
AMENDMENT:	The following corrections are made to the decision:

In the decision record, date of the decision should read 18 October 2018 instead of 17 October 2018.

Hugh Sanderson
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Minying Cai

CASE NUMBER: 1714473

DIBP REFERENCE(S): BCC2016/1740456

MEMBER: Hugh Sanderson

DATE: 17 October 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations.

Statement made on 18 October 2018 at 10:20am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine relationship – validly married – joint bank accounts – regular use of account – joint directors of a company – resides together with child – has a child together – travelled together – attended social events – moved together to regional areas – genuineness of previous spousal relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), Schedule 2 cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 3 July 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 15 May 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 and cl.820.221 because the delegate was not satisfied that the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of China and is currently 28 years old. She first entered Australia on 30 July 2013 holding a Student visa. The sponsor of the applicant is Guijia Wu. He was born in China and is currently 34 years old. He is an Australian citizen.
5. The sponsor was previously married to Yuk Ling Ho who he sponsored for a Partner visa. Allegations were received by the Department that the sponsor's relationship with Ms Ho was contrived and that they did not live together. She was refused the grant of the Subclass 801 Partner (Residence) visa on 8 April 2015. It was claimed by the sponsor that his relationship with Ms Ho ended because they had different opinions towards life and as a result they divorced on 11 January 2015. She departed Australia on 16 June 2015.
6. The parties claimed that they first met each other in February 2010 when the sponsor had returned to China for a visit and they met at a restaurant in their home town. They claim to have met again in June 2015 and their relationship developed after that time. They were married on 17 November 2015. After their marriage, the applicant moved to live with the sponsor and his family. The applicant fell pregnant to the sponsor in February 2016. The applicant and the sponsor travelled overseas together to China for two weeks in April 2016. The applicant gave birth to the parties' child, Ivy Wu, on 25 November 2016.
7. The applicant provided little information in support of the application at the time the application was filed. The Department requested the applicant provide further information in support of the application. Apart from the birth certificate of the parties' child, no further information was provided.
8. As there was little information provided in support of the application, it was not possible for the delegate to make any proper assessment of the application. Accordingly, the delegate was not satisfied that at the time of the application or at the time of the decision the parties were in a genuine relationship and therefore was not satisfied that the applicant was the spouse of the sponsoring partner as defined in s.5F of the Act. Accordingly, the delegate found that the applicant did not meet the criteria in cl.820.211(2) and cl.820.221 and refused the application.

Information to the Tribunal

9. The applicant provided further information to the Tribunal including the following:

- Marriage certificate of the parties;
 - Joint residential tenancy agreement of the parties dated 22 February 2017 at Blacksmiths;
 - Registration of the company, Jay & M Takeaway Pty Ltd dated 2 February 2017 in the names of the parties;
 - Contract for the sale of the business known as Dragon Court Chinese Restaurant in Glen Innes to the parties company;
 - Joint bank account statements of the parties;
 - Statements from friends and family members supporting the relationship;
 - Correspondence of the parties addressed to their shared residence; and
 - Photos of the parties together.
10. In light of the information before the Tribunal the Tribunal has proceeded to a decision without the need for a hearing.
11. The applicant was represented in relation to the review by her registered migration agent.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is the spouse of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 17 November 2015. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the

parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

17. The applicant has provided significant information indicating the financial aspects of the relationship support a finding that they are in a genuine and continuing relationship. The bank account details provided show the parties have a joint bank account and that they are pooling their financial resources. The account provides details of the regular use of this account for the day-to-day household expenses and the use of the account corresponds to the parties living in the Newcastle area and then moving to Glen Innes together. The parties are the joint directors of a company Jay & M Takeaway Pty Ltd. They have purchased a business together through the company in Glen Innes and are operating the business together.
18. Overall, the financial aspects of the relationship indicate the parties are living together and have a mutual commitment to a shared life as husband and wife. The financial aspects indicate the parties are in a genuine and continuing relationship.

Household

19. The parties commenced living together after they were married in the home of the sponsor's parents. They then moved to the Newcastle area where they rented a home together. After purchasing a business they moved to Glen Innes where they currently reside with their child. The parties provided evidence by way of correspondence addressed to them both at the homes they claim to have been residing together.
20. Although the parties had not provided any significant description of their household, the Tribunal is satisfied that the parties have been living in a shared household with their child and that they are jointly responsible for the care and support of their child. This supports a finding that the parties live together and that the relationship is genuine and continuing.

Social aspects

21. The parties have provided statements from friends and relatives indicating that the relationship is recognised as genuine and that they have participated in numerous social activities together. The parties have travelled together for holidays within Australia and also travelled together to China in April 2016, after they were married. The parties have attended as a couple to various social events such as friends weddings and other family gatherings.
22. The Tribunal is satisfied that the parties represent themselves as being in a married relationship with each other and that this relationship is recognised as genuine by their friends and family.

Commitment to each other

23. The parties were married on 17 November 2015 and have been living together since that time. They have now been married for almost 3 years. Over that time they have moved from the sponsor's family home to the Newcastle area and then purchased a business together in Glen Innes. The commitment they have shown to each other by investing in the business and moving to regional New South Wales indicates they consider their relationship as long-term and have provided emotional support for each other in making these commitments.

24. The most significant factor which would indicate the parties are committed to a long-term relationship with each other is the fact that they have a child together. Their daughter, Ivy, is now almost 2 years old. The photos provided in support of the application show the parties together with Ivy at various social functions. The fact that the parties have a child together indicates the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife.

Other aspects

25. The manner in which the parties claimed the relationship developed raises questions as to its genuineness. This is the second person that the sponsor has sponsored for a Partner visa. Ms Ho, who the sponsor claimed he was in a previous relationship with, was refused a Subclass 801 Partner (Residence) visa. The parties claim that although they had known each other since 2010 their relationship only began in June 2015 and five months later they were married.
26. The claims made of the end of the sponsor's relationship with Ms Ho and the commencement of the relationship and marriage shortly thereafter with the applicant strains credibility. The Tribunal has concluded that the relationship between the applicant and the sponsor was in existence for some time before June 2015 and that any claims the sponsor made as to any relationship he had with Ms Ho are not genuine and he was never in a spousal relationship with her. Although this undermines the credibility of the sponsor, this does not mean that his relationship with the applicant is not genuine.
27. The Tribunal has considered all aspects of the relationship both individually and cumulatively. The most significant factor of the parties relationship is the fact that they have a child together. This, together with the other aspects of their relationship as discussed above, must be taken into account when assessing their relationship. The Tribunal is satisfied that the weight of evidence supports a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The parties' relationship is genuine and continuing and that they have been living together in a spousal relationship since they were married in November 2015.
28. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
29. At the time of the application and at the time of this decision the applicant was sponsored by Guijia Wu who is the applicant's spouse and has turned 18. At the time of the application the applicant held a substantive visa.
30. Therefore the applicant meets cl.820.211 and cl.820.221.
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

32. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).